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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO E. HERRERA,

Defendant and Appellant.

F077479

(Super. Ct. No. BF143293A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Franson, Acting P.J., Meehan, J., and Snauffer, J.

STATEMENT OF APPEALABILITY

This appeal is from an order made after judgment, affecting the substantial rights of the appellant, and is authorized by Penal Code section 1237, subdivisions (a) and (b).

STATEMENT OF THE CASE AND FACTS

An amended information filed on June 16, 2014, charged Armando Herrera with three offenses allegedly committed on or about June 5, 2005. Count 1 alleged first degree murder (Pen. Code, § 187¹) with premeditation (§ 189) while participating in criminal gang activity (§ 190.2, subd. (a)(22)) for the benefit or, in association with, or at the direction of a criminal gang (§ 186.22, subd. (b)(1)), and with personal discharge of a firearm resulting in death (§ 12022.53, subd. (d)). Count 2 alleged shooting at an occupied vehicle (§ 246), for the benefit, in association with, or at the direction of a criminal gang (§ 186.22, subd. (b)(1)), and with personal discharge of a firearm resulting in death (§ 12022.53, subd. (d)). Count 3 alleged unlawful carrying of a loaded firearm in public for gang purposes (§ 25850, subd. (c)(3)).

On June 26, 2014, a jury found Herrera guilty of murder in the second degree as a lesser offense of alleged first degree murder, as well as discharging a firearm at an occupied vehicle, and carrying a loaded firearm in public while participating in felonious gang activity as charged. The jury also found as to counts 1 and 2, Herrera personally discharged a firearm resulting in death, and the offenses were committed in association with, for the benefit of, or at the direction of a criminal gang.

On July 25, 2014, Herrera was sentenced to serve an aggregate term of 40 years to life. The trial court imposed the statutory term of 15 years to life for second degree murder, enhanced by 25 years to life pursuant to section 12022.53, subdivision (d). The applicable gang enhancement, a minimum term of 15 years to life pursuant to

¹ All statutory references are to the Penal Code.

section 186.22, subdivision (b)(5), was deemed superfluous.² For count 2, the trial court imposed a term of 15 years to life pursuant to section 186.22, subdivision (b)(4), plus a 25-years-to-life enhancement. The trial court imposed three years for count 3. Punishment for counts 2 and 3 was stayed pursuant to section 654.

On appeal, this Court affirmed the convictions on counts 1 and 2. Finding the gang participation element of count 3 was not proved, the conviction was reduced to a misdemeanor violation of section 25850, subdivision (c)(7). The gang enhancements were reversed and the case was remanded with directions to the trial court to permit the prosecutor to retry the gang enhancements or, if not retried, to resentence Herrera. The remittitur was issued on February 13, 2018.³

On remand, the prosecutor did not elect to retry the gang enhancement allegations. A statement in mitigation was filed seeking in part the trial court's exercise of discretion to strike the section 12022.53 enhancement, as permitted by recently amended section 12022.53, subdivision (h).

Herrera was resentenced on May 1, 2018. The prosecutor opposed the motion to strike the enhancement because, although the gang enhancement was reversed, "the motive behind this senseless shooting was that the defendant shot a rival gang member to raise his status in the gang" and thus, in light of the lack of justification for the shooting and killing, "it would be an injustice to strike the gun enhancement in this case"

The trial court declined to exercise discretion to strike the 25-years-to-life enhancement, stating, in part, as follows:

² See *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465, disapproved on another point in *People v. Mesa* (2012) 54 Cal.4th 191, 199; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239.

³ The facts underlying the conviction are set forth in detail in our prior opinion. (*People v. Herrera* (Oct. 13, 2017, F069894 [nonpub. opn.].)

In regard to the motion to have me strike, essentially, the 12022.53(d) enhancement, I did have the responsibility of presiding over the jury trial and the jury did find that enhancement to be true, based on the evidence that was before them, beyond a reasonable doubt.

I'm declining to strike that enhancement. I don't believe it would be appropriate, reasonable, in the interest of justice.

Resentencing Herrera, the trial court denied his application for probation and imposed an aggregate term of 40 years to life, consisting of the statutory terms of 15 years to life for second degree murder and 25 years to life for personal discharge of a firearm resulting in death. The trial court selected the upper term of seven years for count 2, enhanced by 25 years to life. The trial court imposed one year for count 3. The punishments for counts 2 and 3 were again stayed pursuant to section 654. The trial court decided not to grant any presentence custody credit.⁴

Timely notice of appeal was filed on May 1, 2018.

APPELLATE COURT REVIEW

Herrera's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that Herrera was advised he could file his own brief with this court. By letter on December 21, 2018, we invited Herrera to submit additional briefing. To date, he has not done so.

After independently reviewing the entire record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.

⁴ On November 19, 2018, the trial court corrected the sentence by granting Herrera credit for 1,963 days actually served with zero conduct credit.